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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Raymond Avalos,

10 Petitioner,

11 v.

12 Charles L Ryan, et al.,

13 Respondents.  
14

No. CV-18-00355-TUC-JGZ

**ORDER**

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16 Before the Court is Magistrate Judge Lynette Kimmins' Report and  
17 Recommendation (R&R) recommending that the District Court deny Petitioner's Petition  
18 for Writ of Habeas Corpus, as well as his Motion to Amend his Petition. Petitioner has  
19 filed an objection. After an independent review of the parties' briefing and of the record,  
20 the Court will overrule Petitioner's objection and adopt Judge Kimmins' recommendation  
21 to deny Petitioner's request to amend and to deny his petition.<sup>1</sup>

22 **STANDARD OF REVIEW**

23 When reviewing a Magistrate Judge's Report and Recommendation, this Court  
24 "may accept, reject, or modify, in whole or in part, the findings or recommendations made

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26 <sup>1</sup> Petitioner also seeks an extension to file a Reply Brief to Defendants' Responses  
27 to his Objections. As stated in the R&R, pursuant to Federal Rule of Civil Procedure  
28 72(b)(2), although any party may serve and file written objections, and a party may respond  
to the other party's objections, "[n]o reply brief shall be filed on objections unless leave is  
granted by the District Court." Having reviewed the filings in this case, the Court  
concludes that any reply would not have assisted the Court's determination, and the Court  
will therefore deny Petitioner's Motion for an Extension.

1 by the magistrate judge.” 28 U.S.C. § 636(b)(1). “[T]he district judge must review the  
2 magistrate judge’s findings and recommendations de novo if objection is made, but not  
3 otherwise.” *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc)  
4 (emphasis omitted). District courts are not required to conduct “any review at all . . . of  
5 any issue that is not the subject of an objection.” *Thomas v. Arn*, 474 U.S. 140, 149 (1985).  
6 See also 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; *Reyna-Tapia*, 328 F.3d at 1121; *Schmidt*  
7 *v. Johnstone*, 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003).

## 8 DISCUSSION

9 As set forth in greater detail in the R&R, Petitioner filed a Petition for Writ of  
10 Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging his convictions for aggravated  
11 driving under the influence and aggravated driving with an alcohol concentration of .08 or  
12 more, both of which occurred while his license was suspended, revoked, or restricted. The  
13 Pima County trial court denied his motion to suppress evidence resulting from his traffic  
14 stop, and he was subsequently found guilty following a jury trial. The Arizona Court of  
15 Appeals affirmed his convictions and sentences and the Arizona Supreme Court denied  
16 further review.

17 Petitioner filed a Notice for Post-Conviction Relief (PCR) and counsel was  
18 appointed, but she could not identify any viable claims. Petitioner was granted a window  
19 in which to file a pro se petition, but the PCR court dismissed the PCR proceeding when  
20 Petitioner failed to timely file. Petitioner then filed a second Notice of PCR, which the  
21 PCR court denied, finding that the successive PCR was denied due to Petitioner’s failure  
22 to file his first pro se petition, rather than to any failure on the part of his counsel. The  
23 Court of Appeals affirmed.

24 Petitioner’s Habeas Petition raises a claim that the jury instructions at his trial were  
25 unconstitutional and a second claim that the trial court erred in denying his motion to  
26 suppress. During the pendency of his Habeas Petition, Petitioner also moved to add a third  
27 claim alleging that his trial counsel was ineffective in litigating the motion to suppress and  
28 that his PCR counsel was ineffective in failing to raise this claim of IAC at trial. Magistrate

1 Judge Kimmins recommends that this Court dismiss Petitioner’s petition because Claim  
2 1—that Petitioner’s due process rights were violated due to an improper jury instruction—  
3 is procedurally defaulted, Claim 2—that the trial court improperly denied his motion to  
4 suppress—is not cognizable, and proposed Claim 3—ineffective assistance of trial and  
5 PCR counsel—is procedurally defaulted. Upon independent review of the record, this  
6 Court agrees.

7 Petitioner asserts four objections to the R&R. First, Petitioner argues that  
8 Magistrate Judge Kimmins denied him due process by failing to promptly rule on his  
9 motion to amend his petition to add his proposed IAC claim, thereby preventing him from  
10 exhausting his IAC claim with the Arizona Supreme Court. (Doc. 45, pg. 6.) As  
11 Respondents note, however, Petitioner was free to seek review from the supreme court for  
12 review of his IAC claim months before Judge Kimmins denied his motion to stay, and thus,  
13 the delayed ruling on his motion to amend did not hinder his ability to exhaust his IAC  
14 claim with the supreme court.

15 Petitioner next objects that he was prejudiced because the Magistrate Judge  
16 evaluated Claims 1 and 2 in his Petition alongside his proposed Claim 3, “detracting from  
17 the merits of [his] proposed ineffective assistance of counsel” claim. (Doc. 45, pg. 6.) The  
18 Magistrate Judge reviewed each of the three claims for relief individually, however, and  
19 there is no suggestion in the R&R’s analysis that Claim 3 was given short shrift by virtue  
20 of having been considered at the same time as Claims 1 and 2. Rather, the R&R subjects  
21 Claim 3 to a thorough analysis.

22 Petitioner disputes the Magistrate Judge’s finding that his IAC claim was  
23 procedurally defaulted, arguing that his untimely PCR petition was the result of confusion  
24 caused by his PCR counsel and that, in essence, the Arizona court erred by rejecting his  
25 successive PCR petition as untimely. (Doc. 45, pgs. 9-11.) But correspondence in the  
26 record between Petitioner and his PCR counsel establishes that Petitioner did not have a  
27 reasonable or excusable basis for his confusion, and in any event, the R&R additionally  
28 concludes, after sound analysis, that trial counsel “presented an objectively reasonable

1 argument on the facts and law” during Petitioner’s suppression hearing. (Doc. 44, pg. 10.)

2 Finally, Petitioner argues that appellate counsel’s performance caused his claim to  
3 be procedurally defaulted, that the Arizona courts did not have a fair opportunity to rule on  
4 the effectiveness of appellate counsel, and that the Magistrate Judge noted that his appellate  
5 counsel was in fact ineffective. (Doc. 45, pgs. 12-13.) But as Respondents note, the R&R  
6 did not conclude that his appellate counsel was ineffective or analyze the issue.

7 In sum, the Court adopts the findings in the R&R and concludes that Petitioner’s  
8 objections are unavailing.

### 9 CONCLUSION

10 Accordingly,

11 IT IS ORDERED that the Report and Recommendation (Doc. 44) is ADOPTED.

12 IT IS FURTHER ORDERED that the Motion to Amend the Petition for Writ of  
13 Habeas Corpus (Doc. 32) is DENIED.

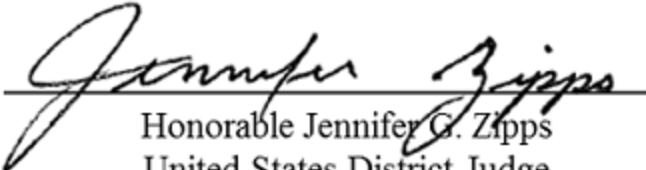
14 IT IS FURTHER ORDERED that the Petition for Writ of Habeas Corpus (Doc. 1)  
15 is DENIED.

16 IT IS FURTHER ORDERED that Petitioner’s Motion for an Extension (Doc. 49) is  
17 DENIED.

18 The Clerk of the Court is directed to close this case.

19 Dated this 5th day of February, 2020.

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Honorable Jennifer G. Zipps  
United States District Judge